IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CTIA – THE WIRELESS ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 07-1432**
	)	
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
	)	
COUNCIL TREE COMMUNICATIONS, INC.,	)	
	)	
Petitioner,	)	
	)	**& Consolidated Case**
v.	)	**No. 07-1454**
	)	
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
	)	

RESPONSE OF FEDERAL COMMUNICATIONS COMMISSION TO MOTION TO TRANSFER

The Federal Communications Commission respectfully files this response in opposition to the motion of Council Tree Communications, Inc. (the petitioner Case No. 07-1454) to transfer the captioned consolidated cases to the United States Court of Appeals for the Third Circuit. Ignoring entirely the distinct issues for review that lead petitioner CTIA plans to present, Council Tree predicates its transfer request on an

allegedly close relationship between its planned challenge to the Commission's "designated entity" rules and another recent challenge to those rules in the Third Circuit. Council Tree provides no basis to believe that the Third Circuit – which held that it had no jurisdiction to consider the merits of Council Tree's claim – is better situated than this Court to address that challenge. Even if it were, there are serious questions whether the order on review here even provides a jurisdictional basis for Council Tree to present its claim. Accordingly, Council Tree has not established that discretionary transfer of these cases is warranted "for the convenience of the parties in the interest of justice." 28 U.S.C. § 2112(a)(5).

BACKGROUND

I. Commission Orders

CTIA (the petitioner in lead Case No. 07-1432) and Council Tree both seek review of the FCC's *700 MHz Second R&O*.[1] That order, issued in WT Docket 06-150, *et al.*, establishes rules governing wireless licenses in the 700 MHz band in advance of an auction of such licenses that Congress directed the Commission to commence no later than January 28, 2008. *See 700 MHz Second R&O* ¶ 15 (citing Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006)). The order addresses numerous matters, *see id.* ¶¶ 3-13, but only one (the "open platform" rule) clearly is pertinent to a challenge before the Court.

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[1] *Service Rules for the 698-747 and 747-762 MHz Bands*, Second Report and Order, FCC 07-132 (released August 10, 2007), 72 Fed. Reg. 48813 (August 24, 2007) ("*700 MHz Second R&O*").

The "Open Platform" Issue. Recognizing that consumers increasingly access the Internet through wireless mobile communications services, and in light of evidence suggesting that providers of such wireless services often restrict their customers' choice of hardware and applications without an appropriate justification, the Commission decided to implement a service rule governing 12 of the licenses to be auctioned that would require the licensee to provide an "open platform" for devices and applications. *700 MHz Second R&O* ¶¶ 198-201, 222. Among other things, the winners of such "C Block" licenses "will not be allowed to disable features or functionality in handsets where such action is not related to reasonable network management and protection, or compliance with applicable regulatory requirements," may not "block Wi-Fi access, MP3 playback ringtone capability, or other services that compete with wireless service providers' own offerings," may not "exclude applications or devices solely on the basis that such applications or devices would unreasonably increase bandwidth demands," and may not "impose any additional discriminatory charges (one-time or recurring) or conditions on customers who seek to use devices and applications outside of those provided by the licensee." *700 MHz Second R&O* ¶ 222. CTIA challenges this "open platform" requirement in its petition for review, arguing that it is "irrational and inconsistent" in light of the "competitive market" for wireless services. *See* Petition for Review, Case No. 07-1432, at 2 (docketed October 22, 2007); CTIA's Non-Binding Statement of Issues to Be Raised, Case No. 07-1432, at 1 (filed November 20, 2007).

The "Designated Entity" Bidding Credit Issue. Petitioner Council Tree purports to challenge the *700 MHz Second R&O* on a completely different question –

alleging that the Commission there "turned a deaf ear to showings by Council Tree and others that the application to [the upcoming 700 MHz Band auction] of restrictions on wholesaling by ["designated entities" or "DEs"] would inappropriately limit DE participation in the auction." Petition for Review, Case No. 07-1454, at 3 (docketed November 6, 2007); *see also* Council Tree's Non-Binding Statement of the Issues, Case No. 07-1454, at 1-2 (December 13, 2007) (raising the question whether the FCC's "decision to enforce, for [the 700 MHz Band auction], the [existing rules regarding DE] bidding eligibility restrictions and unjust enrichment penalties" was unlawful).

The DE eligibility rules that Council Tree seeks to challenge through its current petition for review of the *700 MHz Second R&O* were first adopted in an entirely separate proceeding in 2006. As a general matter, the Commission's rules provide small businesses with bidding credits that they may use to obtain certain auctioned wireless licenses at a discount.[2] Acting in WT Docket 05-211, the Commission tightened eligibility requirements for these DE bidding credits to safeguard against abuse of the program.[3] To that end, the Commission, among other things, provided: (1) that a licensee would be ineligible for DE benefits if it has lease or resale agreements with one or more entities covering, on a cumulative basis, more than 50% of its spectrum under any license; and (2) that a DE that has lease or resale agreements

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[2] *See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures* (WT Docket No. 05-211), Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753 (¶ 9) (2006) ("*DE Second R&O*").

[3] *DE Second R&O* ¶ 24, *on reconsideration*, 21 FCC Rcd 6703 (2006) ("*DE Reconsideration*").

with a single entity covering more than 25% of the DE's spectrum under any license must attribute the lessee's revenues to itself for purposes of determining eligibility for DE benefits. *DE Second R&O* ¶ 25; 47 C.F.R. § 1.2110(b)(3)(iv)(A) & (B)(2006). *See also* 47 C.F.R. § 1.2111(d)(2)(2006) (extending, from 5 to 10 years, the "unjust enrichment" period during which a DE must repay some or all of its bidding credits if it takes action inconsistent with its original eligibility for those credits). Council Tree sought review of these Docket 05-211 DE rules in the Third Circuit, which recently dismissed Council Tree's petition for review on jurisdictional grounds without addressing the merits. *Council Tree Communications, et al. v. FCC*, 503 F.3d 284 (3d Cir. September 28, 2007), *petitions for rehearing pending* ("*Council Tree I*"). Both Council Tree and the Commission have sought rehearing, but those rehearing requests address only the question of the court's jurisdiction.

In April 2007, acting in the *700 MHz* docket (WT Docket 06-150), the Commission entertained questions regarding whether it should apply its existing bidding preference rules in the upcoming 700 MHz Band auction.[4] The Commission concluded in that April 2007 order that it should – noting, among other things, that those rules had worked well in the recently-completed Advanced Wireless Service auction (Auction 66), in which DEs constituted more than half of the winning bidders

[4] *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8064 (¶¶ 59-66) (released April 27, 2007) ("*700 MHz Report and Order and Further Notice*").

and secured more than twenty percent of the licenses sold. *700 MHz Report and Order and Further Notice* ¶ 63.[5]

In the *Further Notice* portion of that April 2007 decision, the Commission also initiated a new round of comments that would lead to the *700 MHz Second R&O* that is on review here. The *Further Notice* addressed the DE eligibility rules in only one narrow respect, involving one party's proposed "Public Safety Broadband Deployment Plan" for less than one-sixth of the 700 MHz Band spectrum at issue in the upcoming auction. *See 700 MHz Report and Order and Further Notice* ¶¶ 268-290 (seeking comment on the so-called "Frontline Proposal" to have the licensee construct and operate a common infrastructure to support a broadband public safety network as well as its own commercial broadband network). The *Further Notice* did not solicit comment on whether the Commission should loosen its DE eligibility rules for that slice of spectrum. To the contrary, it questioned whether bidding preferences of *any kind* would be appropriate with respect to the spectrum at issue in the Frontline Proposal, in light of the "very high" capital costs associated with "constructing a robust network to meet the needs of critical public safety service providers – and the

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[5] When the Commission first adopted service rules for the 700 MHz spectrum years ago, it had expressly determined that its Part 1 designated entity eligibility rules, including "any modifications that the Commission may subsequently adopt," would apply with respect to such spectrum. *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, 17 FCC Rcd 1022 (¶ 166) (2002); *see also Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, 15 FCC Rcd 476 (¶¶ 128-29) (2000). The DE eligibility rules that Council Tree challenged in *Council Tree I*, and which they apparently seek to challenge again in this case, are codified in Part 1 of the Commission's rules.

public – in times of emergency." *Id.* ¶¶ 285-86. And because the proposal would have expressly required the licensee to operate only as a wholesaler with respect to commercial uses of the spectrum, the Commission observed that the proposal might be inconsistent with the Commission's DE eligibility rules, in any event. *Id.* ¶¶ 287-88.

In the *700 MHz Second R&O* on review here (¶¶ 535-37), the Commission ultimately decided that DE bidding credits would be available if an eligible small business secured the license associated with the 700 MHz Public/Private Partnership.[6]

II. The Petitions for Review

Lead petitioner CTIA initially filed its petition for review in this Court on October 22, 2007. On October 23, 2007, Council Tree filed its petition for review in the Third Circuit, which transferred the case to this Court under the mandatory transfer requirements of 28 U.S.C. § 2112(a)(1) & (a)(5). On November 13, 2007, this Court consolidated the CTIA and Council Tree petitions. Order, D.C. Circuit Nos. 07-1432 & 07-1454. In its December 21, 2007, Motion to Transfer, Council Tree now seeks to transfer the consolidated cases to the Third Circuit.

ARGUMENT

Congress enacted 28 U.S.C. § 2112 to provide a "neutral and random determinant of a forum in cases in which several circuits may have concurrent jurisdiction to review agency action." *Natural Resources Defense Council, Inc. v.*

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[6] As Council Tree notes, the Commission in another recent order "waived the 50 Percent Retail Rule" with respect to that block of spectrum. Motion at 8 n.9.

EPA, 673 F.2d 392, 397 (D.C. Cir. 1980). Where, as here, neither petitioner filed its petition for review within the initial 10-day period following issuance of the *700 MHz Second R&O*, *see* 28 U.S.C. § 2112(a)(1) & (a)(5), the statute implements Congress's "preference for the court in which review proceedings are first instituted." *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC v. NLRB*, 610 F.2d 956, 963 (D.C. Cir. 1979). The D.C. Circuit, in which CTIA "first instituted" its petition for review on October 22, 2007, is that court.

Council Tree nevertheless argues that the Court should transfer the captioned cases to the Third Circuit "[f]or the convenience of the parties in the interest of justice," 28 U.S.C. § 2112(a)(5), because it claims the *700 MHz Second R&O* is "closely related" to the WT Docket No. 05-211 orders it unsuccessfully attempted to challenge in *Council Tree I*. Motion at 8-11. In particular, Council Tree asserts that both this case and the Third Circuit case raise questions related to the lawfulness of the same designated entity rules, and that the Third Circuit is already familiar with the issues related to its challenge by virtue of the recent briefing and argument in *Council Tree I*. *Ibid.* This request suffers from several independent defects.

As an initial matter, Council Tree almost completely ignores lead petitioner CTIA's presence in the consolidated cases before this Court. If these cases are to be transferred at all, section 2112(a)(5) requires that both of them be transferred together. *See* 28 U.S.C. § 2112(a)(5) (the discretionary transfer authority contemplates the "transfer [of] *all* proceedings with respect to that order") (emphasis added). *See also Natural Resources Defense Council*, 673 F.2d at 399 (under section 2112(a), "judicial

challenges to 'the same order' *must* be heard in one court of appeals") (emphasis added); *ACLU v. FCC*, 486 F.2d 411, 413 (D.C. Cir. 1973) (section 2112(a) "contemplates judicial review of particular agency action by the same court"). Yet there is no overlap whatsoever between the "open platform" issue CTIA plans to present in this case and the DE issues Council Tree attempted to present to the Third Circuit in *Council Tree I*. Transfer of the cases to the Third Circuit in these circumstances would negate the threshold "first filed" preference embodied in section 2112(a) without securing any additional judicial efficiency in review of the open platform issue. Moreover, the "interest of justice" hardly supports Council Tree's belated effort to transfer the cases. If securing the Third Circuit as a forum is as important to Council Tree as it now claims, Council Tree should have sought to secure that forum as of right by filing its petition for review in the Third Circuit during the initial 10-day period following issuance of the *700 MHz Second R&O*. *See* 28 U.S.C. § 2112(a). It did not do so.

Second, even if CTIA's distinct "open platform" claim were not part of this case, transfer would be inappropriate. As Council Tree acknowledges (Motion at 6), the Third Circuit in *Council Tree I* did not rule on the merits of the Commission's DE rules, instead holding that it did not have jurisdiction even to entertain Council Tree's claims. Accordingly, review by this Court rather than the Third Circuit would pose no legitimate concern regarding "continuity and consistency" in judicial decisionmaking on the merits of those rules. *Abourezk v. FPC*, 513 F.2d 504, 505 (D.C. Cir. 1975). Indeed, even if Council Tree's attempts to restart the Third Circuit litigation succeed,

see Motion at 7 (referring to Council Tree's mandamus and rehearing petitions), such concerns would be attenuated since the order on review here was issued in a different administrative docket with a different record from the one that was before the Third Circuit. *See Newsweek, Inc. v. United States Postal Service*, 652 F.2d 239, 244 (2d Cir. 1981) (the pendency in another court of appeals of cases involving "different records and dockets, albeit * * * some similarity of issues," does not provide an adequate basis for discretionary transfer under section 2112(a)).

Third, there is serious question whether Council Tree will even be able to raise its DE claims by means of this petition for review, further weakening any connection between this case and *Council Tree I*. As the chronology recited above (at pp. 3-6) indicates, the Commission decided to apply its existing DE bidding preference rules to the upcoming 700 MHz auction in the April 2007 *700 MHz Report and Order and Further Notice* (at ¶¶ 59-66) – an order that Council Tree never challenged and that is not on review here. And although the *Further Notice* portion of that document (at ¶¶ 285-88) referred to the DE rules in the narrow context of soliciting comment on the Frontline Proposal, it did not reopen the question generally for consideration in the *700 MHz Second R&O*. Accordingly, Council Tree's planned argument regarding the DE rules in this case appears, in reality, to be a time-barred challenge to the *700 MHz Report and Order and Further Notice*, over which this Court lacks jurisdiction. *See Charter Communications, Inc. v. FCC*, 460 F.3d 31, 38 (D.C. Cir. 2006) (challenge to

a Commission determination first adopted in prior order is time-barred, where the NPRM leading to the order directly on review did not reopen the question).[7]

Moreover, even if Council Tree's proposed challenge to the DE rules were not entirely barred in this case, the challenge that Council Tree featured most prominently in the Third Circuit proceedings would be unavailable here. As Council Tree acknowledges (Motion at 3-4, 5 n.6, 6), a major component of its challenge to the DE rules in *Council Tree I* was the claim that the rules were adopted without adequate notice and opportunity for comment under the Administrative Procedure Act. It is well-settled, however, that such challenges to the "procedural lineage" of a rule may not be raised every time the Commission subsequently applies or enforces it. Instead, such procedural claims may be brought only on direct review – within the 60-day period prescribed in 47 U.S.C. § 402(a) and 28 U.S.C. § 2344 – of the order or orders adopting the rule. *JEM Broadcasting Company, Inc. v. FCC*, 22 F.3d 320, 324-25 (D.C. Cir. 1994); *accord National Labor Relations Board Union v. FLRA*, 834 F.2d 191, 196 (D.C. Cir. 1987); *National Resources Defense Council v. NRC*, 666 F.2d 595, 602-03 (D.C. Cir. 1981). That order was the 2006 *DE R&O* (which was

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[7] In its petition for review in this case, Council Tree stated that the Commission in the *700 MHz Second R&O* "specifically rejected a request to stay its revised DE rules" for the upcoming auction. Council Tree Petition for Review at 3 (citing *700 MHz Second R&O* ¶ 532 n.1083). The Commission there, however, was merely responding briefly (in a footnote) to filings seeking relief beyond the scope of the *Further Notice*. It is well settled that "'an agency [does not] reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter.'" *Biggerstaff v. FCC*, __ F.3d __, 2007 WL 4553048, at *5 (D.C. Cir. December 28, 2007) (quoting *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, 88 F.3d 1191, 1213 (D.C. Cir. 1996)).

reaffirmed in the *DE Reconsideration*), not the *700 MHz Second R&O* on review here. Accordingly, any claim that the Commission's DE rules were adopted in violation of APA notice-and-comment requirements would be time-barred here, thus removing the most significant alleged area of overlap between this case and *Council Tree I.*

Finally, although it is well settled that mere "general familiarity with the legal questions presented by a case" provides no basis for transfer,"[8] it is noteworthy that such general familiarity with the legal landscape would not favor the Third Circuit over this Court in any event. Council Tree does not even allege any Third Circuit familiarity with the open platform issue, which this Court, by contrast, has already confronted on a preliminary basis in considering lengthy, merits-based pleadings regarding a motion for expedited review of the *700 MHz Second R&O* filed by an earlier petitioner that has since voluntarily dismissed its challenge.[9] Moreover, on the broad issue of the Commission's enforcement of the statutory mandate to assure that designated entities have reasonable opportunities to participate in auctions for spectrum licenses (*see* 47 U.S.C. §§ 309(j)(3)(B) & (j)(4)(D)), this Court has substantially more experience than the Third Circuit, having issued four published decisions addressing the merits of the relevant statutory provisions,[10] while the Third

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[8] *American Public Gas Ass'n v. FPC*, 555 F.2d 852, 857 (D.C. Cir. 1976).

[9] *See* Order, D.C. Circuit No. 07-1359, filed October 3, 2007 (denying emergency motion for expedited review filed by Cellco Partnership, d/b/a/ Verizon Wireless).

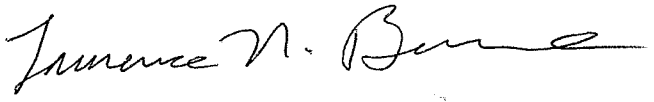
[10] *See, e.g., Omnipoint Corporation v. FCC*, 78 F.3d 620 (D.C. Cir. 1996); *Sioux Valley Rural Television, Inc. v. FCC*, 349 F.3d 667 (D.C. Cir. 2003); *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999); *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999).

Circuit has issued none. And on auction-related issues generally, this Court has vastly more experience than any other court of appeals.[11]

CONCLUSION

For the foregoing reasons, the Court should deny Council Tree's motion to transfer the captioned cases to the Third Circuit.

Respectfully submitted,



Matthew B. Berry
Acting General Counsel
Joseph R. Palmore
Deputy General Counsel
Daniel M. Armstrong
Associate General Counsel
Laurence N. Bourne
Counsel

Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(202) 418-1740

January 10, 2008

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[11] *See, e.g., Northpoint Technology, Ltd. v. FCC*, 414 F.3d 61 (D.C. Cir. 2005); *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145 (D.C. Cir. 2005); *Minnesota Christian Broadcasters, Inc. v. FCC*, 411 F.3d 283 (D.C. Cir. 2005); *Delta Radio, Inc. v. FCC*, 387 F.3d 897 (D.C. Cir. 2004); *Advanced Communications Corp. v. FCC*, 376 F.3d 1153 (D.C. Cir. 2004); *BDPCS, Inc. v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003); *Ranger Cellular v. FCC*, 348 F.3d 1044 (D.C. Cir. 2003).

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Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Tamika S. Parker, hereby certify that the foregoing "Response Of Federal Communications Commission To Motion To Transfer" was served this 10th day of January, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

Michael F. Altschul
CTIA - The Wireless Association
1400 16th Street, NW
Suite 600
Washington DC 20036

Counsel For: CTIA - The Wireless Association

Ian Heath Gershengorn
Jenner & Block, LLP
601 Thirteenth Street, N.W.
Suite 1200
Washington DC 20005

Counsel For: CTIA - The Wireless Association

Henry Goldberg
Goldberg, Godles, Wiener & Wright
1229 Nineteenth St., N.W.
Washington DC 20036

Counsel For: Skype Communications S.A.R.L.

Donna N. Lampert
Lampert & O'Connor, P.C.
1776 K Street, N.W.
Suite 700
Washington DC 20006

Counsel For: Google, Inc.

Robert A. Long, Jr.
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington DC 20004-2401

Counsel For: Frontline Wireless LLC

Andrew G. McBride
Wiley Rein LLP
1776 K Street, N.W.
11th Floor
Washington DC 20006-2359

Counsel For: Cellco Partnership d/b/a Verizon Wireless

Carl W. Northrop
Paul, Hastings, Janofsky & Walker, L.L.P.
875 15th Street, N.W.
Washington DC 20005

Counsel For: MetroPCS Communications, Inc.

Andrew J. Schwartzman
Media Access Project
1625 K Street, N.W.
Suite 1118
Washington DC 20006

Counsel For: Public Interest Spectrum Coalition

John T. Scott, III
Verizon Wireless
1300 Eye St., N.W.
Suite 400 W.
Washington DC 20005

Counsel For: Cellco Partnership d/b/a Verizon Wireless

S. Jenell Trigg
Leventhal Senter & Lerman PLLC
2000 K Street, N.W., Suite 600
Washington DC 20006-1809

Counsel For: Council Tree Communications, Inc.

07-1432

Robert J. Wiggers
U.S. Dept. of Justice
Antitrust Div., Appellate Section
950 Pennsylvania Avenue, N.W., Room 3224
Washington DC 20530-0001

Counsel For: USA

Tamika S. Parker